

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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GINA ALCANTARA,

Plaintiff,

V.

BODEGA LATINA CORP.,

Defendant.

Case No. 2:18-cv-00882-JAD-DJA

ORDER

This matter is before the Court on Defendant's Motion for Protective Order (ECF No. 78), Motion to Extend Time (ECF No. 79), and Motion to Amend Answer (ECF No. 80), filed on May 15, 2020. Plaintiff filed Responses (ECF Nos. 82-84) on May 29, 2020 and Defendant filed Replies (ECF Nos. 85-86 and 89) on June 5 and June 9, 2020. The Court finds this matter properly resolved without a hearing. See Local Rule 78-1.

I. Background

The Court and the parties are familiar with the facts of this case and they will only be repeated as necessary. The Court conducted a hearing on Plaintiff's Motion to Compel (ECF No. 44) on February 5, 2020. It ordered that three years of prior incidents from all three Las Vegas stores, excluding the bathrooms and produce sections, be produced within thirty days of the hearing. On April 7, 2020, the Court further ruled on a subsequent dispute regarding the scope of production and redaction requests. (ECF No. 77). It also ordered the parties to meet and confer on a stipulated protective order governing the exchange of discovery material and submit it for the Court's approval.

Defendant seeks a protective order to be entered by the Court pursuant to Fed.R.Civ.P. 26(c) as the parties have been unable to agree to the terms of a stipulated protective order to govern the disclosure of discovery documents. (ECF No. 78). Defendant proposed Exhibit A as

1 the protective order to be entered, but indicates that Plaintiff has objected to the following four
2 provisions: it is overbroad to the extent it covers other documents that might be discovered;
3 precludes Plaintiff from contacting customers; requires a hearing regarding the documents to be
4 conducted *in camera*; and requires certain steps for handling documents after the conclusion of
5 the litigation. As a result, Defendant proposed a revised protective order (Exhibit C) but two of
6 the issues remain unresolved: Part II, Subpart H's prohibition on contacting customers and Part
7 V, Subpart B's requirement for an *in camera* hearing. Further, Defendant continued to meet and
8 confer and offered to stipulate to liability, which it claims would make the documents irrelevant.

9 Plaintiff responds that a protective order is unwarranted at this point given that the
10 discovery documents disclosed by Defendant did not include medical records. (ECF No. 84).
11 Further, Plaintiff argues that Defendant has failed to establish that an injured person's name and
12 how they became injured, which is information included in the incident reports, constitutes a
13 trade secret. Accordingly, Plaintiff claims there is not good cause for a protective order at all.

14 Defendant replies that Plaintiff's position that no protective order should be issued at all
15 despite agreeing to all but two terms is untenable. (ECF No. 89). It requests that the Court enter
16 the proposed protective order as to the terms the parties agreed upon along with the two
17 provisions that Defendant seeks to add, and again relies on its contention that incident reports are
18 entitled to trade secret protection.

19 Defendant also seeks an order extending the deadline to amend pleadings, which expired
20 on March 5, 2019. (ECF No. 79). It indicates that the parties have participated in private
21 mediation, which was unsuccessful, but it has taken into account the posture of the case and is
22 seeking to admit liability. Defendant cites to the former Local Rule 26-4, which it should be
23 noted was moved to Local Rule 26-3 in the amendments that were adopted on April 17, 2020. It
24 simply claims good cause and excusable neglect exists given the result of the November 22, 2019
25 hearing was an adverse jury instruction against Defendant. Accordingly, Defendant seeks to
26 amend its answer to admit liability. (ECF No. 80).

27 Plaintiff responds that Defendant's request to extend the deadline and amend its answer
28 should be denied as it is submitted more than a year after the expiration of the deadline to amend

1 pleadings. (ECF No. 83). In fact, Plaintiff claims that Defendant is only seeking to amend, six
 2 months after sanctions were issued in the form of an adverse jury instruction, to avoid the
 3 consequence of the adverse jury instruction. Plaintiff argues that Defendant cannot satisfy the
 4 excusable neglect standard as the reason for delay is bad faith given that Defendant has
 5 aggressively litigated Plaintiff's access to relevant liability evidence, failed to disclose evidence,
 6 and misrepresented the existence of evidence. (ECF No. 82).

7 Defendant replies that it could not have foreseen the Court would sanction it for spoliation
 8 of evidence and the attorneys fees award. (ECF No. 85). It claims Plaintiff will not be prejudiced
 9 because no further discovery is needed, no delay to the litigation will occur, and it acted in good
 10 faith. (ECF No. 86).

11 **II. Analysis**

12 **a. Protective Order**

13 Federal Rule of Civil Procedure 26(b)(1) provides for broad and liberal discovery.
 14 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's
 15 claim or defense." *Id.* However, a court may limit discovery via Rule 26(c), which permits the
 16 court to issue a protective order to protect a party or person from annoyance, embarrassment,
 17 oppression, or undue burden or expense when the party establishes good cause. For good cause
 18 to exist, the party seeking protection bears the burden of showing specific prejudice or harm will
 19 result if no protective order is granted. *See Beckman Indus., Inc., v. Int'l. Ins. Co.*, 966 F.2d 470,
 20 476 (9th Cir. 1992). Rule 26(c) requires more than "broad allegations of harm, unsubstantiated
 21 by specific examples or articulated reasoning." *Id; see also Foltz v. State Farm*, 331 F.3d 1122,
 22 1130 (9th Cir. 2003) (*citing San Jose Mercury News, Inc., v. District Court*, 187 F.3d 1096, 1102
 23 (9th Cir. 1999) (holding that the party must make a particularized showing of good cause)).

24 The Supreme Court has interpreted the language of Rule 26(c) as conferring "broad
 25 discretion on the trial court to decide when a protective order is appropriate and what degree of
 26 protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Additionally, the
 27 Supreme Court has acknowledged that the "trial court is in the best position to weigh fairly the
 28 competing needs and interests of the parties affected by discovery. The unique character of the

1 discovery process requires that the trial court have substantial latitude to fashion protective
2 orders.” *Id.*

3 As the Court previously noted on two occasions, it finds that a protective order governing
4 the disclosure of discovery is warranted in this case. The Court will approve Defendant’s
5 proposed protective order as it addresses third party privacy concerns in discovery disclosures,
6 but with the following modifications to the two outstanding issues. First, it will not approve Part
7 II, Subpart H as Defendant has not met its burden of demonstrating customer information is a
8 trade secret and that customers should not be contacted. Defendant contends that the Part II,
9 Subpart H’s prohibition on contacting customers is needed because the information gathered by
10 the store in the process of recording incidents reported by customers is a trade secret protected by
11 NRS § 600A.030 and would be misappropriated by Plaintiff contacting those customers.
12 Specifically, Defendant argues that the process used by the store to gather information from
13 customers is not generally known and has actual or potential value. Further, Defendant claims
14 that the data gathered by the store during its investigation – including customer names, addresses,
15 contact information, dates of incidents, descriptions, and other data – has independent economic
16 value from not being generally known. Finally, Defendant again claims that the customers from
17 the prior incidents are not relevant. The Court is not persuaded by these arguments and will
18 therefore not approve Part II, Subpart H.

19 Second, as for Defendant’s proposed Part V, Subpart B’s provision that the Court conduct
20 an *in camera* hearing, it simply claims this provision is needed so that the information regarding
21 customers is not disclosed publicly. This fails to meet the governing standard to seal and the
22 Court is not inclined to issue an advisory opinion permitting all discovery motions to be
23 conducted *in camera*.

24 **b. Reopening of the Amending the Pleadings Deadline for Defendant to
25 Amend Answer**

26 Rule 15(a)(2) of the Federal Rules of Civil Procedure, regarding the amendment of
27 pleadings, directs that “[t]he court should freely give leave when justice so requires.” The Ninth
28 Circuit Court of Appeals has repeatedly cautioned courts in this circuit to “liberally allow a party

1 to amend its pleading.” *Sonoma Cnty. Ass’n of Ret. Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117
 2 (9th Cir. 2013). “Courts may decline to grant leave to amend only if there is strong evidence of
 3 ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure
 4 deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue
 5 of allowance of the amendment, or futility of amendment, etc.’” *Id.* at 1117 (*quoting Foman v.
 6 Davis*, 371 U.S. 178, 182 (1962)).

7 When leave to amend is sought after the amendment deadline in the court’s scheduling
 8 order has expired, the movant must also show good cause to reopen the amendment period and
 9 excusable neglect for the delay. *See Fed. R. Civ. P. 6(b)(1)(B)* (stating “the court may, for good
 10 cause, extend the time . . . on motion made after the time has expired if the party failed to act
 11 because of excusable neglect.”); *see also Fed. R. Civ. P. 16(b)(4)*.

12 In evaluating excusable neglect, the court weighs: “(1) the danger of prejudice to the non-
 13 moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the
 14 reason for the delay, including whether it was within the reasonable control of the movant, and
 15 (4) whether the moving party’s conduct was in good faith.” *Pincay v. Andrews*, 389 F.3d 853,
 16 860 (9th Cir. 2004) (citing *Pioneer Investment Services Co. v. Brunswick Associates Limited
 17 Partnership*, 507 U.S. 380, 395 (1993)). The weight assigned to these factors is left to the court’s
 18 discretion. *Id.* When a court can “conceive of facts that would render plaintiff’s claim viable,” or
 19 “it appears at all possible that the plaintiff can correct the defect,” an amendment should not be
 20 found futile. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1988) (internal
 21 quotation marks and citations omitted).

22 As Defendants filed its Motion to Amend after the expiration of the March 5, 2019
 23 deadline to amend the pleadings, it falls under Rule 16. (ECF No. 20). As noted above,
 24 Defendant cites to the former Local Rule 26-4, which was replaced by Local Rule 26-3 in the
 25 amendments to the Local Rules that were adopted on April 17, 2020, in support of its request to
 26 reopen the amending the pleadings deadline. Moreover, Defendant simply claims good cause and
 27 excusable neglect exists to amend its answer at this stage of the litigation because it has evaluated
 28 the effect of the adverse jury instruction it was issued as a sanction for spoliation of evidence at

1 the November 22, 2019 hearing. Notably, the only deadline that Defendant seeks to extend is the
2 amending the pleadings deadline – as all discovery deadlines have closed. Plaintiff also cites the
3 old version of the Local Rules, including LR 26-4, but is correct that the excusable neglect
4 standard applies as the deadline has expired.

5 Ultimately, the Court finds that Defendants should be permitted to amend its answer as
6 requested in order to streamline the disputed issues left for trial. While the deadline to amend
7 pleadings expired over 14 months ago, the passage of time is not reason enough to preclude
8 amendment. *See, e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981)
9 (“Ordinarily, leave to amend pleadings should be granted regardless of the length of time of delay
10 by the moving party absent a showing of bad faith by the moving party or prejudice to the
11 opposing party.”). Moreover, the Court has considered all of the arguments of the parties in the
12 briefing and finds that amendment at this stage would be neither extraordinarily disruptive nor
13 prejudicial to Plaintiff.

14 As for Plaintiff’s argument regarding prejudice, the Court recognizes that it imposed an
15 adverse jury instruction as a sanction in November 2019. Subsequently, the parties attended a
16 private mediation and were unable to resolve this case via settlement. As such, Defendant is only
17 now, 6 months after the sanction was imposed, seeking to admit to liability. Plaintiff claims that
18 she would no longer have the benefit of the adverse jury instruction and the Court should not
19 condone Defendant’s discovery behavior by permitting the amendment as it is made in bad faith.
20 Plaintiff highlights that Defendant is seeking to make prior incidents irrelevant on issues of notice
21 and foreseeability, but still disputing causation as Defendant’s proposed amendment still denies
22 paragraphs 15 and 17 of the Complaint. As such, Plaintiff claims she would be prejudiced
23 without the adverse jury instruction in presenting her evidence on causation. However, the Court
24 does not agree that the adverse jury instruction is eliminated simply by permitting the requested
25 amendment. Indeed, the Court is not reconsidering its Order that provided an adverse jury
26 instruction and that remains preserved for the District Judge’s discretion at trial. As such, the
27 Court is not excusing Defendant’s discovery conduct nor removing the sanction imposed at this
28 point.

As for the disruption to the litigation, the Court recognizes that no further discovery would be needed. Also, there would be no delay to the case as the next steps are the settlement conference and filing of the joint pretrial order. As such, the Court cannot find the amendment to be extraordinary disruptive even though it is sought at this late stage of the litigation. Therefore, the Court will grant Defendant's request to reopen the deadline to amend the pleadings and request to amend its answer at this stage of the litigation.

ORDER

8 IT IS THEREFORE ORDERED that Defendant's Motion for Protective Order (ECF No.
9 78) is **granted in part and denied in part as outlined above.**

10 IT IS HEREBY RECOMMENDED that Defendant's Motion to Extend Time (ECF No.
11 79) is **granted only to the extent that Defendant may file an amended answer.**

12 IT IS FURTHER ORDERED that Defendant's Motion to Amend Answer (ECF No. 80) is
13 granted. Defendant shall file and serve its proposed amended answer.

14 DATED: June 24, 2020.


DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE